(37,512)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 815

MISSOURI STATE LIFE INSURANCE COMPANY AND HARTFORD ACCIDENT & INDEMNITY COMPANY, PETITIONERS,

vs.

MARION JOHNSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

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IN THE

Supreme Court of the United States

MISSOURI STATE LIFE INSURANCE COMPANY

AND

HARTFORD ACCIDENT & INDEMNITY COMPANY, *Petitioners,*

v.

MARION JOHNSON, *Respondent.*

TRANSCRIPT OF RECORD FROM THE SUPREME COURT OF ARKANSAS

STIPULATION

It is stipulated that the clerk of this court, in preparing the transcript of the record to be filed in the Supreme Court of the United States, in connection with appellant's petition for writ of certiorari, may eliminate the testimony of the witnesses which was taken at the trial in the lower court. Review is sought in the Supreme Court of the United States upon the ground that this case should have been removed to the Federal court, and the testimony of the witnesses has no bearing upon that question.

It is expressly agreed and understood between the parties hereto, and their counsel, that, in executing this stipulation, the appellee, Marion Johnson, does not waive any legal rights he may have, or to which he may be entitled.

Dated this 10th day of January, 1933.

Rose, Hemingway, Cantrell
& Loughborough,
Attorneys for Appellant.

John L. McClellan and
Sam T. & Tom Poe,
Attorneys for Appellee.

Filed January 11, 1933.
W. P. Sadler, Clerk.

IN THE HOT SPRING CIRCUIT COURT

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company ..... Defendant.

COMPLAINT

The plaintiff, Marion Johnson, for cause of action against the defendant, Missouri State Life Insurance Company, states: The plaintiff is a citizen and resident of Hot Spring County, Arkansas.

The defendant is, and was at the times hereinafter mentioned, an insurance corporation duly organized and existing under the laws of the State of Missouri for the purpose of insuring persons and, among other things, providing for

them indemnity for total disability by bodily injury or disease, and also for loss of eyesight resulting from bodily injuries effected through external, violent and accidental means independently of all other causes, and is lawfully engaged in such insurance business within the State of Arkansas.

On or about the 4th day of October, 1927, in consideration of the payment by the plaintiff to the defendant of a monthly premium of $1.20, the defendant, by its agents duly authorized thereto, make and delivered its policy of insurance, in writing, G-2377, Certificate No. 1075, and thereby insured the plaintiff, among other things, providing indemnity in the amount of $2,000 for total and permanent disability, caused by bodily injury or disease which wholly disabled and prevented plaintiff from engaging in any gainful occupation, prior to attaining 60 years of age, and which disability has existed for a period of six months.

On or about the 4th day of October, 1927, in consideration of the payment by plaintiff to defendant of a monthly premium of forty cents (40c), the defendant, by its agents, duly authorized thereto, made and delivered to plaintiff, its certificate of accidental death, dismemberment and loss of sight indemnity insurance, No. 1075, in writing, under Group Policy No. ADD-501, issued and delivered by defendant to Missouri Pacific Railroad Company, the employer of plaintiff, and thereby insured plaintiff, among other things, providing indemnity in the amount of $1,000 in the event plaintiff suffered an accidental loss of sight of one eye by external, violent and accidental means, inde-

pendently of all other causes, within ninety (90) days from the date the injury was sustained.

On or about the ..... day of March, 1930, while both of the policies and certificates were in full force, plaintiff suffered an accidental bodily injury by reason of an automobile in which he was a passenger overturning and falling upon him.

As a result of the automobile overturning and falling upon plaintiff the fifth and sixth cervical vertebrae of plaintiff's spine were fractured and his spine was dislocated between the fifth and sixth cervical vertebrae. There has also been a decrease in the size of the anterior portions of the bodies of the fifth and sixth cervical vertebrae and the articulation between the same has been diminished, with a fusion of the joint anteriorly. The body of the sixth cervical vertebrae was crushed and is tilted with the left side higher than the right. Callous has formed on both sides of the fifth and sixth cervical vertebrae. The articulation between the sixth and seventh cervical vertebrae is also narrowed.

There is also a dislocation of the cervical column beginning at the articulation of the fifth and sixth cervical vertebrae. The structures of the cervical column above this site are displaced anteriorly and are out of line.

There is also a tilting of the bodies of the third and fourth thoracic, or dorsal vertebrae, with a narrowing of the articulations in this region.

There is an ankylosis of the cervical column and also of the thoracic, or dorsal, portion of the spine; and there

is also a chronic traumatic hyperthophic arthritis of the cervical and thoracic, or dorsal, portion of the spine, all of which is a result of the injury received by plaintiff when the automobile overturned and fell upon him.

Plaintiff also lost the sight of his right eye as the result of the automobile overturning and falling upon him.

As a result of the injury he received when the automobile overturned and fell upon him, the plaintiff has ever since suffered for mitral insufficiency, hypertension, dyspnoea, and a shock to his entire nervous system, all of which has disabled him and rendered him physically unfit to earn a livelihood since he was injured.

Plaintiff is totally and permanently disabled by reason of said injury and bodily disease.

The defendant has refused to pay plaintiff although plaintiff has duly performed all the conditions of said policies and certificates on his part to be performed.

On or about the ..... day of May, 1930, within the time required for furnishing proof of loss, plaintiff gave to the defendant due notice of his injury and on or about October 23, 1931, gave proof of loss and the duration of his disability and demanded payment of the amount due under the terms of the certificates and policies, which the defendant has refused to pay.

There is now due and owing from the defendant to the plaintiff the sum of three thousand dollars ($3,000), with interest thereon at the rate of 6% per annum from October 23, 1931.

By reason of the Statutes of the State of Arkansas therein made and provided to cover cases such as this, the defendant is also liable to pay plaintiff an amount equal to 12% of the principal sum and interest owed plaintiff by way of penalty, and a reasonable attorney's fee for the prosecution and collection of the same.

Wherefore, plaintiff asks judgment against the defendant in the sum of three thousand ($3,000) dollars, with interest thereon at the rate of 6% per annum from October 23, 1931, until paid, together with a penalty of 12% on said amount, and reasonable attorney's fee and all costs herein expended.

Sam T., Tom & Donald Poe,
Tom Poe,
Attorneys for Plaintiff.

Filed on the 8th day of December, 1931.

Jack Kight, Clerk.

IN THE CIRCUIT COURT OF HOT SPRING COUNTY

Marion Johnson.....Plaintiff,

v.

Missouri State Life Insurance Company.....Defendant.

Summons issued on the 8th day of December, 1932.

Summons served on the 9th day of December, 1932.

IN THE CIRCUIT COURT OF
HOT SPRING COUNTY, ARKANSAS

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company ..... Defendant.

AMENDMENT TO COMPLAINT

Comes the plaintiff, Marion Johnson, and for amendment to his original complaint herein, amends the following paragraph of said complaint, to-wit: "By reason of the statutes of the State of Arkansas therein made and provided to cover cases such as this, the defendant is also liable to pay plaintiff an amount equal to 12% of the principal sum and interest owed plaintiff by way of penalty, and a reasonable attorney's fee for the prosecution and collection of the same." Be and the same is hereby amended to read as follows:

By reason of the statutes of the State of Arkansas therein made and provided to cover cases such as this, the defendant is also liable to pay the plaintiff a reasonable attorney's fee for his attorney herein for the prosecution and collection of the sum due him herein, which should be taxed as costs in this action.

That plaintiff specifically waives the allegation contained in his original complaint to the effect that the defendant is also liable to pay to him an amount equal to 12% of the principal sum and interest owed plaintiff by way of penalty, and also his prayer for recovery of said penalty.

Plaintiff does not waive any other allegations contained in his original complaint herein.

Wherefore, plaintiff prays judgment against the defendant Missouri State Life Insurance Company, in the sum of $3,000 with interest thereon at the rate of 6% per annum from October 23, 1931, until paid, together with a reasonable attorney's fee for his attorneys herein and for all of his costs herein expended.

John L. McClellan,
Sam T., Tom and Donald Poe,
By John L. McClellan,
Attorneys for Plaintiff.

Filed on Jan. 16, 1932.

Jack Kight, Clerk.

By V. H. Kight, D. C.

IN THE HOT SPRING CIRCUIT COURT

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company ..... Defendant.

PETITION FOR REMOVAL

The petition of Missouri State Life Insurance Company, defendant in the above entitled action, respectfully shows to this Honorable Court:

That petitioner is defendant in the above entitled action.

That said action is of a civil nature.

That said plaintiff in his complaint herein, claims in substance thereon the 4th day of October, 1927, the defendant delivered to him its policy of insurance providing indemnity in the amount of $2,000 for total and permanent disability caused by bodily injury or disease, prior to attaining the age of sixty years. That on the 4th day of October, 1927, the defendant issued to said plaintiff its policy insuring the said plaintiff against dismemberment and loss of sight, in the amount of $1,000.

That during the month of March, 1930, the plaintiff suffered accidental bodily injuries by reason of an automobile overturning and falling upon him. That as a result thereof the plaintiff has lost the sight of his right eye and has become totally and permanently disabled. Plaintiff further claims that there is now due him under said policies the sum of $3,000 with interest thereon at 6% from October 23, 1931, and in addition thereto that he is entitled to a reasonable attorney's fee. A reasonable attorneys fee in case involving policies aggregating $3,000 would amount to at least $250.

Petitioner disputes said claim and denies all liability under the contract set out in the complaint herein.

That the matter in dispute in this action exceeds the sum of $3,000, exclusive of interest and costs.

That the controversy in this action, and every issue of fact and law therein is wholly between citizens of different states, and which can be fully determined as between them. That is to say, the plaintiff is now, and was at the

time of the filing of the complaint in this action, a citizen and resident of the State of Arkansas, and the defendant was then and still is a corporation organized and existing under the laws of the State of Missouri, and a citizen of said State of Missouri.

That the time for your petitioner as defendant in this action, to answer or plead to the complaint has not yet expired.

Your petitioner presents herewith a good and sufficient bond as provided by the statute in such cases, that it will enter in the district court of the United States, for the Western Division of the Eastern District of Arkansas, within thirty days from the filing of this petition, a certified copy of the record in this suit, and for the payment of all costs which may be awarded by the said court if the said district court shall hold that this suit was wrongfully or improperly removed thereto.

Petitioner therefore prays that this court proceed no further herein, except to make the order of removal as required by law, and to accept the bond presented herewith, and direct a transcript of the record herein to be made for said court as provided by law.

W. H. Glover,
Rose, Hemingway, Cantrell & Loughborough,
Attorneys for Petitioner.

State of Arkansas, County of Pulaski—

I, A. F. House, under oath, state that I am one of the attorneys representing the petitioner, Missouri State Life

Insurance Company. That I have read the foregoing petition, and that the allegations therein made are true to the best of my information and that no official of said petitioner is within the State of Arkansas.

A. F. House.

Subscribed and sworn to before me this 16th day of January, 1932.

Rebecca D. Norton,
Notary Public.

(Seal) My commission expires Nov. 1st, 1933.

Filed Jan. 18th, 1932.

Jack Kight, Clerk.
By V. H. Kight, D. C.

IN THE HOT SPRING CIRCUIT COURT

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Co. ..... Defendant.

BOND

KNOW ALL MEN BY THESE PRESENTS:

That we, Missouri State Life Insurance Company, as principal, and United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto Marion Johnson, plaintiff in the above entitled cause, his successors and assigns, in the sum of Five Hundred Dollars ($500), lawful

money of the United States of America, for the payment of which well and truly to be made, we and each of us bind ourselves, and each of us, our heirs, executors and administrators jointly and severally, by these presents.

The conditions of this obligation are such that:

WHEREAS, the said Missouri State Life Insurance Company has applied by petition to the Circuit Court of Hot Spring County, of the State of Arkansas, for the removal of a certain cause therein pending, wherein Marion Johnson is plaintiff, and the said Missouri State Life Insurance Company is defendant, to the district court of the United States for the Eastern District of Arkansas, Western Division, for further proceedings on grounds in the said petition set forth, and that all further proceedings in said action in said Hot Spring Circuit Court be stayed.

Now, therefore, if your petitioner, the said Missouri State Life Insurance Company, shall enter in said district court of the United States, for the Eastern District of Arkansas, Western Division, aforesaid, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and shall pay or cause to be paid all costs that may be awarded therein by said district court of the United States if said court shall hold that said suit was wrongfully or improperly removed, thereto, then this obligation be void; otherwise, shall remain in full force and effect.

MISSOURI STATE LIFE INS. CO.,
By Rose, Hemingway, Cantrell & Loughborough,
Attorneys.

PRINCIPAL

United States Fidelity & Guaranty Company,
By Wylie B. Miller,
Attorney in Fact.

SURETY

(SEAL)
Filed Jan. 18th, 1932.
Jack Kight, Clerk.
By V. H. Kight, D. C.

IN THE HOT SPRING CIRCUIT COURT

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company ..... Defendant.

ORDER ON PETITION FOR REMOVAL

This cause coming on for hearing upon petition and bond of the defendant herein for an order transferring this cause to the United States District Court for the Eastern District of Arkansas, Western Division, and it appearing to the court that the defendant has filed its petition for such removal in due form of law, and that the defendant has filed its bond, duly conditioned, with good and sufficient

sureties, as provided by law, and that defendant has given plaintiff due and legal notice thereof, but it appearing to the court that this is not a proper cause for removal to said District Court, it is therefore ordered that said petition be and the same is hereby overruled, to which action of the court the petitioner excepted and asked that its exceptions be noted of record, which is accordingly done.

Thomas E. Toler,
Judge.

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company..... Defendant.

On this 18th day of January, 1932, comes the defendant and files its petition and bond for removal to the Federal Court. Said petition is by the court overruled, to which ruling of the court in overruling said petition the defendant duly excepted and ask that their exceptions be noted of record, which is accordingly done.

IN THE HOT SPRING CIRCUIT COURT

Marion Johnson ..... Plaintiff,

v

Missouri State Life Insurance Company..... Defendant.

MOTION

The plaintiff herein claims that he lost the sight of his right eye as the result of an automobile accident. He also alleges that he is totally and permanently disabled by rea-

son of certain injuries to his spine and cervical vertebrae. This defendant has never had an opportunity to examine said plaintiff, and in order to properly prepare its defense herein, it asks that the plaintiff be required to submit to a physical examination by some physician appointed by the court, and that defendant be given a reasonable time after such examination to file its answer herein.

Rose, Hemingway, Cantrell & Loughborough,
Attorneys for Defendant.

Wm. H. Glover.

Filed on the 19th day of Jan. 1932.

Jack Kight, Clerk.

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company..... Defendant.

On this 20th day of January, 1932, motion to have plaintiff to submit to physical examination filed and is by the court granted. Whereupon the court appoints Drs. Hodges and Prickett to make the examination of plaintiff as ordered.

On this same day answer of defendant is filed and noted of record. Motion for continuance is also filed and noted of record.

IN THE HOT SPRING CIRCUIT COURT

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company..... Defendant.

ANSWER

It is not true that the plaintiff's spine was fractured and dislocated as the result of an automobile overturning and falling upon him. It is not true that the articulation between his fifth and sixth cervical vertebrae was crushed and is tilted. It is not true that callous has formed on both sides of the fifth and sixth cervical vertebrae. It is not true that the articulation between the sixth and seventh cervical vertebrae is narrowed. It is not true that there is a dislocation of the cervical column, beginning at the articulation of the fifth and sixth cervical vertebrae. It is not true that the structure of the cervical column above this site are displaced and out of line. It is not true that there is a tilting of the bodies of the third and fourth dorsal vertebrae. It is not true that there is an ankylosis of the cervical column and of the dorsal portion of the spine. It is not true that there is a chronic traumatic hypertrophic arthritis of the cervical and dorsal portions of the spine.

It is not true that the plaintiff lost the sight of his right eye as the result of an automobile overturning and falling upon him.

It is not true that the plaintiff, as a result of the alleged injury, has ever since suffered from mitral insufficiency,

hypertension, dyspnoea and a shock to his entire nervous system.

It is not true that he has been disabled and is physically unable to earn a livelihood since he was injured. It is not true that he is totally and permanently disabled by reason of said alleged diseases and bodily injuries.

It is not true that the plaintiff had duly performed all of the conditions of said policies and certificates on his part to be performed.

It is not true that the plaintiff, on or about the ..... day of May, 1930, within the time required for furnishing proof of loss, gave to the defendant due notice of his injury. It is not true that on or about October 23, 1934, he gave proof of loss and the duration of his disabilities.

It is not true that there is now due and owing from the plaintiff to the defendant the sum of $3,000, with interest thereon at the rate of six per cent per annum from October 23, 1931.

Answering further this defendant states that by the provisions of Group Policy No. ADD 501, and Certificate No. 1075, it is required that immediate written notice of any accident for which claim is made should be given, and that affirmative proof of loss on forms furnished by the defendant must be furnished to the company at its home office at St. Louis, Mo., within ninety days after the date of the loss, for which the claim is made. The required notice was not given, and the plaintiff did not furnish affirmative proof of loss on the company's forms within a period of ninety days.

Certificate No. 1075, issued under Group Policy G-2377, contains the following provisions:

"If the employee shall furnish the company with due proof that before having attained the age of sixty years he or she has become totally and permanently disabled by bodily injury or disease, and that he or she is then and will be at all times thereafter, wholly prevented thereby from engaging in any gainful occupation, and that he or she has been so permanently and totally disabled for a period of six months, the company will immediately pay to the employer in full settlement of all the obligations hereunder, the amount of insurance in force hereunder on the employee at the time of the approval by the company of the proofs as aforesaid."

The plaintiff herein did not become totally and permanently disabled by bodily injury or disease prior to attaining the age of sixty years.

Answering further, this defendant stated that it has reasonable grounds for declining to pay the plaintiff's claim, and to assess an attorney's fee against it pursuant to the provisions of section 6155 of Crawford & Moses' Digest will deprive it of its property without due process of law, and deny to it the equal protection of the laws in contravention to the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, defendant prays that the complaint be dismissed and that it have judgment for its costs.

Rose, Hemingway, Cantrell & *et al.*

Filed Jan. 20th, 1932.

Jack Kight, Clerk.

IN THE HOT SPRING CIRCUIT COURT

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company ..... Defendant.

MOTION FOR CONTINUANCE

The defendant asks that the court continue this case for the term, and for cause states:

That the complaint herein was filed on the 8th day of December, 1931, and the plaintiff prayed for judgment for the sum of Three Thousand ($3,000) the statutory penalty of twelve (12) per cent, and a reasonable attorney's fee. This stated a cause of action which was removable to the United States District Court, Western Division, Eastern District of Arkansas, and on January 18th, 1932, the defendant herein served notice upon attorneys representing the plaintiff that it would, on Monday, January 18th, 1932, move the court for an order removing said cause to said Federal Court. Counsel for plaintiff, a short time subsequent to the service of the notice to remove filed an amendment to the complaint, in which the claim for the statutory penalty of twelve (12%) was eliminated. Upon filing the petition and bond for removal, the court herein declined to remove the case upon the theory that the elimination of the claim for the statutory penalty deprived the Federal Court of jurisdiction.

Plaintiff herein sues upon an accident policy which requires the giving of notice within a prescribed period, and

this defendant, as one of its defenses, will claim that the required notice was not given. All of the officials of the company who are familiar with the claim, and the absence of required notice, reside in St. Louis, Missouri, and the defendant is desirous of taking their depositions to be used in the trial of this cause.

But for the stating of a cause which was removable, prior to the amendment of the complaint herein, the defendant would have made preparations for the trial of this cause, and would have taken the depositions of the St. Louis witnesses and it now prays that the court continue this cause for the term.

W. H. Glover, Rose, Hemingway, Cantrell and Loughborough,

Attorneys for Defendant.

VERIFICATION

State of Arkansas, County of Pulaski—

I, A. F. House, under oath say that I am one of the attorneys representing the defendant. That the allegations in the foregoing motion are true.

A. F. House.

Subscribed and sworn to before me this 19th day of January, 1932.

Rebecca D. Norton,

(Seal) Notary Public.

My commission expires Nov. 1, 1933.

Filed Jan. 20, 1932.

Jack Kight, Clerk.

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company..... Defendants.

On this 22nd day of January, 1932, comes the plaintiff Marion Johnson and by his attorney J. L. McClellan and comes also the defendant Missouri State Life Insurance Company by its attorneys and at this time motion for continuance coming on to be heard, same having been filed on the 20th day of January, 1932, and after hearing said motion the same is by the court overruled, to which ruling of the court in overruling said motion the defendant duly excepted and ask that its exceptions be noted of record which is accordingly done.

Whereupon this cause coming on to be heard same having been reached upon the regular call of the docket, comes the plaintiff Marion Johnson, and by his attorneys Tom Poe and J. L. McClellan and comes also the defendant Missouri State Life Insurance Company by its attorneys and both parties announce ready for trial.

Whereupon comes E. T. Phillips and eleven others of the regular panel of the petit jury who are duly sworn to answer questions as to their qualifications, found competent, duly selected, empaneled and sworn to try said cause. And after hearing all the evidence adduced by both parties herein, instructions of the court and argument of counsel, retired to consider of its verdict and after due deliberations returned into open court with the following verdict, to-wit:

"We, the jury, find for the plaintiff in the sum of $3,000 with interest at 6% per annum from Oct. 23, 1931. Signed by jurors as follows: E. T. Phillips, W. H. Thornton, Selmon Price, Sam Owens, Tom Wright, Clarkes Backman, Roy Sanders, C. Hughes and Jewell Petties.

It is therefore considered, ordered and adjudged by the court that the plaintiff Marion Johnson do have and recover of and from the defendant Missouri State Life Insurance Company the sum of $3,000 with interest at the rate of 6% per annum from the 23rd day of Oct., 1931. It is further ordered that the plaintiff herein do have and recover of and from defendant herein all his cost in this action. All of which execution may issue.

IN THE HOT SPRING CIRCUIT COURT

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company ..... Defendant.

MOTION TO TAX ATTORNEY'S FEE

Comes the plaintiff, Marion Johnson, and moves the court to tax as costs in this case an attorney's fee, as provided by section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas.

John L. McClellan and

Sam T., Tom & Donald Poe,

Attorneys for Plaintiff.

Johnson

v.

Missouri State Life Insurance Company.

In the month of October, 1931, Marion Johnson, formerly employed as a mechanic in the planing mill in the Missouri Pacific Railroad Company shops in North Little Rock, Arkansas, consulted the law firm of Sam T. & Tom Poe asking advice as to whether he could recover a total and permanent disability benefits and also accidental loss of sight of one eye from Missouri State Life Insurance Company in the amount of $2,000 and also $1,000 under two certificates of insurance issued to Mr. Johnson by the insurance company while an employee of the Missouri Pacific Railroad Company. The certificates of insurance had been issued Mr. Johnson on October 4, 1927, by reason of two separate group insurance policies issued by Missouri State Life Insurance Company to Missouri Pacific Railroad Company covering all its employees.

The certificate of insurance providing payment of total and permanent disability benefits in the amount of $2,000 to Mr. Johnson contained a clause which was as follows, to-wit:

"If the employee shall furnish the company with due proof that before having attained the age of sixty years, he or she has become totally and permanently disabled by bodily injury or diseases, and that he or she is then, and will be at all times thereafter, wholly prevented thereby from engaging in any gainful occupation and that he or

she has been so permanently and totally disabled for a period of six months, the company will immediately pay to the employee in full settlement of all obligations hereunder, the amount of insurance in force hereunder on the employee at the time of the approval by the company of the proofs aforesaid.'"

The certificate of insurance providing payment of benefits to Mr. Johnson in event of the accidental loss of sight of one eye contained a benefit clause which was as follows, to-wit:

"This is to certify that under and subject to the terms and conditions of a Group Policy of Accidental Death and Dismemberment Insurance, No. ADD-501, issued and delivered to the Missouri Pacific Railroad Company (hereinafter called the employer) by the Missouri State Life Insurance Company (hereinafter called the Company) Marion Johnson, while an employee of the employee of the employer, and during the continuance of said policy, shall, in the manner therein provided, be insured for the sum of $2,000 (hereinafter called the entire amount payable).

"DISMEMBERMENT AND LOSS OF SIGHT

"(b) for the amount indicated opposite each loss in the following schedule, provided such loss, resulting from bodily injuries effected through external, violent and accidental means independently of all other causes, shall occur within ninety (90) days from the date of accident.

"ACCIDENTAL LOSS OF

.....

Sight of one eye. .....One-half entire amount payable.

....."

Mr. Johnson, as an employe of the Missouri Pacific Railroad Company, was also issued a third certificate of insurance under another group policy issued by Missouri State Life Insurance Company to the employees of the Missouri Pacific Railroad Company. This certificate paid disability benefits to Mr. Johnson in case of total disability by reason of accident or illness at the rate of $15 per week for a period of time not exceeding 26 weeks. Disability benefits had been paid by Missouri State Life Insurance Company for about 5 weeks at the rate of $15 per week prior to the time he employed attorneys to collect the total and permanent disability benefits and also for accidental loss of sight from Missouri State Life Insurance Company.

Under the terms of the group policies of insurance between Missouri State Life Insurance Company and Missouri Pacific Railroad Company, the premiums paid by Mr. Johnson were deducted from the wages paid by the railroad company to Mr. Johnson monthly and paid to the insurance company. The premiums were not paid by Mr. Johnson to Missouri State Life Insurance Company subsequent to December, 1930.

Mr. Johnson stated he was injured on March 8, 1930, when an automobile in which he was riding overturned and pinned him beneath it. He remained under the automobile

for several minutes and the entire weight of the automobile rested on and across his neck and shoulders. As a result of the injuries received, Mr. Johnson was rendered unconscious and suffered intense and severe pain. He was carried to a hospital in Malvern, Arkansas, where he was attended and treated by a physician. The same night Mr. Johnson was removed to the home of his daughter in Malvern, Arkansas, where he was bedfast for one week, being unable to get out of bed without assistance. He lost the sight of his right eye and was also unable to use his arms or to rotate or flex his head and neck in either direction. Later Mr. Johnson was removed to his home near Rolla, Arkansas, where he remained in bed for several weeks. No X-ray picture was made of Mr. Johnson's neck or spine to determine if he had received any dislocation or fracture at the time he was treated for the injuries immediately following the automobile accident. When the acute pain subsided he had a limitation of motion in the neck, head and shoulders and was unable to perform hard manual labor as he had done before he was injured. He could not bend, stoop or lift heavy objects except with great discomfort and intense pain. His neck felt like it was broken and he had a shortness of breath and suffered continuously with headaches.

Although he felt physically unable to do so, Mr. Johnson returned to work at the Missouri Pacific Railroad Company shops in North Little Rock, Arkansas, in May, 1930, and continued to work there off and on at irregular intervals until December, 1930. He was assisted in performing the duties required of him by his fellow employees during all

that time and the duties required of him were also lighter than he had been accustomed to perform before he was injured. Mr. Johnson did not attempt to work after December, 1930. He attained the age of 60 years on July 10, 1930.

Mr. Johnson was examined by a physician in October, 1931, and also had an X-ray picture made of his neck and spine at that time. This examination and the X-ray revealed his neck was dislocated and two of the cervical vertebrae were fractured and crushed. Some of the thoracic, or dorsal, vertebrae were also injured. Ankylosis and arthritis had also developed in both the cervical and dorsal regions of the spine.

Mr. Johnson was without funds to pay court costs or attorney's fee. On October 23, 1931, he employed John L. McClellan and Sam T. & Tom Poe to represent him in the collection of the disability benefits due him by Missouri State Life Insurance Company. The agreement to pay the attorneys was contingent upon the success of the attorneys in obtaining a recovery for Mr. Johnson. It was agreed if the claim was collected without the necessity of litigation that 25 per cent of the total amount recovered would be paid by Mr. Johnson to the attorneys; and, if litigation was required to collect, that Mr. Johnson would pay the attorneys 50 per cent of the total amount recovered.

Payment of the disability benefits due Mr. Johnson was demanded of the Missouri State Life Insurance Company by the attorneys on October 23, 1931. The Missouri State Life Insurance Company refused to pay the claim.

The original letter of Missouri State Life Insurance Company to Sam T. & Tom Poe, attorneys, and dated November 5, 1931, denying all liability under the two certificates of insurance is attached hereto, marked Exhibit No. 1 and made a part hereof.

Liability under the certificate providing for total and permanent disability benefits was specifically denied because Mr. Johnson had attempted to work after he had attained the age of 60 years. The reason given for refusing to pay the claim under the certificate providing for indemnity in event of accidental loss of sight of one eye was predicated upon failure of the insured to give immediate written notice of the accident and also to furnish affirmative proof of loss within 90 days after the automobile accident in which Mr. Johnson was injured.

Suit was filed on December 8, 1931, in the Hot Spring County, Arkansas, Circuit Court, to enforce collection of the disability benefits due Mr. Johnson. The statutory penalty and attorney's fee were asked in addition to the amount of the claim, which was $3,000 and interest.

Prior to the time the defendant insurance company was required to plead, plaintiff amended his complaint and omitted the prayer for judgment for the statutory penalty of 12 per cent as provided by section 6155 of Crawford & Moses' Digest.

The defendant insurance company served notice on attorneys for plaintiff that it would file a petition for removal to the United States District Court at the time it was first required to plead in the Hot Spring Circuit Court.

The Hot Spring Circuit Court denied the petition for removal to the United States District Court. Thereupon, a motion for continuance was filed by defendant insurance company, which was also denied by the Hot Spring Circuit Court.

An answer was filed, defendant company denying plaintiff was totally and permanently disabled before having attained the age of 60 years; and also denying that he had lost the sight of one eye. It was also contended in its answer that plaintiff had failed to give immediate written notice of the accident or that he had furnished affirmative proof of loss within 90 days after the accident.

It was also contended by the insurance company that it had reasonable grounds for declining to pay plaintiff's claim for total and permanent disability benefits and that to assess an attorney's fee against it as provided by section 6155 of Crawford & Moses' Digest would deny to it the equal protection of the laws, and deprive it of its property without due process of law, in contravention of the 14th Amendment to the Constitution of the United States.

It is the avowed intention of defendant, Missouri State Life Insurance Company, to appeal this case to the Supreme Court of the State of Arkansas and, if unsuccessul there, to prosecute an appeal to the Supreme Court of the United States.

The case was set for trial on January 21, 1931, but was passed because of being crowded off the docket.

It was reset for trial on January 22, 1931, when it was tried and a verdict was returned for plaintiff for the full

amount for which suit was filed. The trial required one (1) day.

At the trial eighteen (18) witnesses testified on behalf of the plaintiff. Six (6) of these witnesses were medical experts.

Four (4) witnesses testified at the trial on behalf of the defendant.

In the preparation of the case for trial the attorneys were required to and did devote the better part of twenty (20) days to preparing the case for trial. This consisted of interviews with the plaintiff and his witnesses, many of whom were medical experts; the searching for and finding of records of hospitals and the railroad company by which plaintiff was employed; in preparing instructions; searching the authorities to determine if plaintiff was entitled to collect the disability benefits; reading medical text books treating of the symptoms, conditions and injuries from which plaintiff suffered.

In preparing the case for trial in the Hot Spring Circuit court, and in the trial, the plaintiff and his attorneys were required to incur expenses in the amount of $388.94, all of which has either been paid or will have to be paid by plaintiff and his attorneys.

Assuming the above statement of facts to be true, what in your opinion, would be a reasonable attorney's fee (1) for the trial of this case in the Hot Spring County, Arkansas, Circuit Court?; (2) for trial of this case in the Supreme Court of Arkansas?; (3) for the trial of this case in the Supreme Court of the United States

MISSOURI STATE LIFE INSURANCE COMPANY.

HOME OFFICE, SAINT LOUIS

Hillaman Taylor, President.

CLAIM DEPARTMENT

November 5, 1931.

Messrs. Sam T. & Tom Poe,
Attorneys at Law,
510 Wallace Building,
Little Rock, Arkansas.

Re: Policies G-2377, ADD-501 & SAH-534
Missouri Pacific Railroad Company Certificates
1075
Marion Johnson

Gentlemen:

Supplementing my letter of October 26, the investigation which we have thus far made definitely establishes that this party worked on a full time and full pay basis after attaining age sixty and that he received full payment under his insurance for temporary disability as he sustained during the period his insurance was in force. Because of this, there does not seem to be any liability on our part either under the Group Life policy.

Neither does there appear to be any liability under policy ADD-501 for the alleged loss of sight of one eye sustained in March, 1930, as apart from the fact that immediate written notice was not given us of such loss, as required by the terms of this policy contract, affirmative proof of loss was not furnished us at our Home Office here in St.

Louis within ninety days after the date of the loss, as also required by the policy contract. The following further provision of the policy contract seems applicable to this alleged claim: "No legal proceedings for recovery hereunder shall be commenced within three months nor after one year from the date of any loss for which the Company shall be liable."

Yours very truly,

C. J. Loftus,
Manager, Group Life Claim Division.

"EXHIBIT No. 1"

State of Arkansas, County of Pulaski—

Tom Poe, on oath, states that he is one of the attorneys for the plaintiff in the above entitled cause and that he is familiar with the facts set out in the statement of facts attached to plaintiff's motion to tax attorney's fee as costs in this action and that said statement of facts hereto attached are true.

Tom Poe

Subscribed and sworn to before this 25th day of January, 1932.

(SEAL) Grace Lassiter,
Notary Public.

My commission expires July 30, 1932.

Filed on January 26th, 1932.

Jack Kight, Clerk.

IN THE HOT SPRING CIRCUIT COURT

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company ..... Defendant.

ORDER

On this day comes on plaintiff's application for the allowance of an attorney's fee, and the same is submitted to the court upon the testimony of John McClellan, H. B. Means, Sam Poe, Jabez Smith, W. H. Glover, Jr., Tom Roland, A. I. Roland, D. M. Halbert and Albert Jernigan, and the court being well and sufficiently advised, doth find that the plaintiff is entitled to an attorney's fee of $550, and the same is hereby assessed and taxed as a part of the costs in this case.

The defendant at the time excepted to the court's action of fixing the attorney's fee in the amount of $550 for the reason that the same is excessive, and asked that the same be noted of record, which is accordingly done, and the defendant at the same term excepted to the action of the court in assessing any attorney's fee at all for the reason that it had reasonable grounds for contesting this claim, and that the assessing of the attorney's fee under the circumstances will deny to it the equal protection of the laws, and deprive it of its property without due process of law in contravention to the Fourteenth Amendment to the Constitution of the United States.

The defendant asked that its exceptions on this ground be noted of record, which is accordingly done.

Thomas E. Toler, Circuit Judge.

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company ..... Defendant.

Filed for and on Jan. 28, 1932. Jack Kight, Clerk.

On this 26th day of January, 1932, defendant is given until Friday, 29th day of January, 1932, to file motion for a new trial herein.

On this same motion by plaintiff to tax attorney's fee as cost filed. Also motion to strike from above motion filed, and said motion coming on to be heard and after hearing said motion the same is by the court overruled, to which ruling of the court in overruling said motion the defendant duly excepted and asked that its exceptions be noted of record, which is accordingly done.

The matter of determining amount of attorney's fee to be taxed as a part of the cost came on to be heard and after hearing testimony of D. M. Halbert, Tom Roland, A. W. Jernigan, A. I. Roland and J. M. Smith, attorneys of this bar, and argument of counsel, the court finds that the attorney's fee should be $550.

It is therefore considered, ordered and adjudged by the court that the attorneys, J. L. McClellan and Tom Poe, should have and recover of and from the defendant herein the sum of $550.

IN THE HOT SPRING CIRCUIT COURT

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company ..... Defendant.

MOTION FOR A NEW TRIAL

Comes the defendant, and moves the court to set aside the judgment rendered herein and grant a new trial for the following reasons:

1. Because the verdict is contrary to the law.

2. Because the verdict is contrary to the evidence.

3. Because the verdict is contrary to both the law and the evidence.

4. Because the court erred in overruling defendant's petition to remove this case to the United States District Court.

5. Because the court erred in giving plaintiff instruction number 1, over the objection of the defendant.

6. Because the court erred in giving plaintiff's instruction number 2, over the objections of the defendant.

7. Because the court erred in giving plaintiff's instruction number 3, over the objections of the defendant.

8. Because the court erred in giving plaintiff's instruction number 4, over the objection of the defendant.

9. Because the court erred in giving plaintiff's instruction number 4, over the objection of the defendant.

10. Because the court erred in giving plaintiff's instruction number 6, over the objection of the defendant.

11. Because the court erred in giving plaintiff's instruction number 7, over the objection of the defendant.

12. Because the court erred in giving plaintiff's instruction number 8, over the objection of the defendant.

13. Because the court erred in modifying defendant's instruction number 3 by adding the words: "and was not totally and permanently disabled during that time."

14. Because the court erred in modifying defendant's instruction number 10 by adding the following clause: "Provided you find the defendant, by its acts herein, has not waived proof of loss, as defined in these instructions."

15. Because the court erred in refusing to give defendant's instruction number 1.

16. Because the court erred in refusing to give defendant's instruction number 2.

17. Because the court erred in refusing to give defendant's instruction number 5, and erred in modifying said instruction.

18. Because the court erred in refusing to give defendant's instruction number 3, and erred in modifying said instruction.

19. Because the court erred in taxing an attorney's fee of $550 against the defendant, which is excessive.

20. Because the court erred in taxing an attorney's fee of $550 against the defendant, when the defendant had reasonable grounds for contesting this claim.

WHEREFORE, defendant prays that the verdict of the jury, and the judgment rendered herein, be set aside, and that it be granted a new trial.

W. H. Glover,

Rose, Hemingway, Cantrell & Loughborough,

Attorneys at Law.

Filed: Jan. 28, 1932.
Jack Kight, Clerk.

Marion Johnson ..... Plaintiff,

v.

Missouri State Life Insurance Company ..... Defendant.

On this 28th day of January, 1932, comes the defendant herein and files its motion for a new trial herein and said motion coming on to be heard, and after hearing said motion the same is by the court overruled, to which ruling of the court in overruling said motion the defendant at this time duly excepted and ask that its exceptions be noted of record, which is accordingly done.

Whereupon, the defendant at this time prays an appeal to the Supreme Court of Arkansas, which is by the court granted. Defendant given 90 days in which to prepare and file its bill of exceptions with the clerk of this court.

State of Arkansas, County of Hot Spring—

I, Jack Kight, circuit clerk within and for the said county and State aforesaid, do hereby certify that the foregoing typewriting matter contains a true, complete and compared copy of records and proceedings in the circuit court of said county in which Marion Johnson was plaintiff and Missouri State Life Insurance Company was defendant.

In witness whereof, I have hereunto set my hand and affixed the seal of said court on this the 12th day of March, 1932.

Jack Kight,

(SEAL) Circuit Clerk

No. 2591

Missouri State Life Insurance Co.

v. Hot Spring, Thos. E. Toler, J., $11.50

Marion Johnson

Transcript,

Filed March 14, 1932.
W. P. Sadler, Clerk.
By C. R. Stevenson, D. C.

State of Arkansas—In the Supreme Court—

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the court room, in the State House, in the city of Little Rock, on the 23rd day, being the fourth Monday of May, A. D. 1932, the following proceedings were had, to-wit:

• • •

November 14, 1932

Missouri State Life Insurance Company.....Appellant,

v. 2591 Appeal from Hot Spring Circuit Court

Marion Johnson .....Appellee.

This cause came on to be heard upon the transcript of the record of the circuit court of Hot Spring County, and was argued by counsel, on consideration whereof it is the opinion of the court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things affirmed with costs, and that said appellee recover of said appellant and Hartford Accident & Indemnity Company, surety in the supersedeas bond filed in this cause, the sum of THREE THOUSAND DOLLARS, with interest at six per cent per annum from the 23rd day of October, 1931, as adjudged by said circuit court, and the further sum of FIVE HUNDRED AND FIFTY DOLLARS, as her attorney's fee adjudged by said circuit court to be taxed as costs.

It is further considered that said appellee recover of said appellant and said surety all her costs in this court and the court below, including the attorney fee aforesaid, in this cause expended, and have execution thereof.

IN THE SUPREME COURT OF ARKANSAS

November 14, 1932

MISSOURI STATE LIFE INSURANCE CO. *v.* JOHNSON

OPINION

HUMPHREYS, J. Appellee instituted suit against appellant in the circuit court of Hot Spring County to recover $2,000 for permanent injuries received by him in an automobile accident on a certificate of insurance issued to him by appellant under Group Policy G-2377, issued by appellant to the Missouri Pacific Railroad Company, protecting its employees from total disability on account of bodily injury or disease and to recover $1,000 for the loss of an eye in the same accident on a certificate of insurance issued to him by appellant under Group Policy ADD-501, issued by appellant to the same railroad company, protecting its employees against accidental injuries. Appellee alleged that he was totally and permanently injured in an automobile accident on the 8th day of March, 1930, before he attained the age of sixty years and, as a result of the accident, also lost the sight of his right eye, and prayed for judgment in the sum of $3,000 and costs, including an attorney's fee.

Appellant filed a motion to transfer the cause to the United States District Court for the Eastern District of Arkansas, alleging a diversity of citizenship and that the amount sued for, including an attorney's fee, exceeded $3,000. This motion was denied over the objection and exception of appellant.

Appellant, reserving its objection to the jurisdiction of the court to try the cause, filed an answer denying the material allegations of the complaint.

The cause was submitted upon the pleadings and testimony, resulting in a judgment for $3,000 and costs, including an allowance of an attorney's fee in the sum of $550, from which is this appeal.

The group insurance policies were issued and delivered to the Missouri Pacific Railroad Company and remained in its possession in its general office at St. Louis. They were never in the possession of appellee nor subject to his inspection as far a the record reflect. The certificates were the only documents issued to him under the terms of the major policies. The only provision in the certificates as to either notice or proof of loss is as follows:

"Immediately upon receipt of due proof of loss, the company will pay to the employee in full settlement of all obligations hereunder, the amount set opposite such loss: * * *."

Only those protected under Group Policy G-2377 were eligible for protection under Group Policy ADD-501. Group Policy ADD-501 contained the following provision relative to notice and proof of claim:

"Immediate written notice with full particulars and full name and address of insured employee shall be given by the employer to the company of any accident, injury, or loss for which claim shall be made under the terms thereof. Affirmative proof of loss, on forms furnished by the com-

pany, must be furnished to the company at its home office, St. Louis, Missouri, within ninety days after the date of the loss for which claim is made."

Group Policy G-2377 and the certificate issued under same provides that indemnity benefits of $2,000 shall be payable only if the insured, before attaining the age of sixty years, has become totally and permanently disabled; and Group Policy ADD-501 and the certificate issued under same provide that an indemnity of $1,000 shall be paid for the loss of one eye resulting from bodily injuries effected through external, violent, and accidental means, independently of all other causes, * * *.

The facts, stated most favorably to appellee, are as follows:

On March 8, 1930, before appellee attained the age of sixty years, he was injured in an automobile wreck. As a result of the accident, appellee received a severe injury to his neck and spine and lost the sight of his right eye. After recovering to some extent from the injury to his neck and spine, he returned to his work on April 28, 1930, and performed the light duties connected with the character of work he was employed to do with the assistance and aid of his co-laborers until the shops closed down in December, 1930. He was unable to do the heavy work connected with his job. He did not realize the serious condition of his neck and spine until October, 1931, at which time Dr. Law of Little Rock made an X-ray picture of the injured parts, which revealed that his neck bones had been fractured. The picture showed that there was a compression type

fracture of the bodies of the fifth and sixth cervical vertebrae; that the sixth cervical vertebrae was crushed and tilted; that there was a dislocation of the cervical column; that the thoracic and dorsal vertebrae were jammed together; that the articulation between the vertebrae in the lower spine were narrowed and the bodies of the third and fourth dorsal vertebrae tilted; and that ankylosis had followed as a result of the injuries to the spine.

According to the testimony of a majority of the physicians who were witnesses in the case, appellee should never have returned to work and that his neck and spine injuries permanently disabled him from performing hard manual labor. His duties required that he peform labor of that character.

Appellant contends for a reversal of the judgment upon the ground that the trial court erred in denying its petition for removal of the cause to the Federal Court. It is argued that to include an attorney's fee in the amount sued for exceeds $3,000, interest and costs and in amount makes the cause a removable one under the Federal Removal Statute. This court has ruled otherwise in the case of *Mutual Life Ins. Co.* v. *Marsh,* 185 Ark. 332. In the case referred to, it was ruled that an attorney's fee in cases of this nature must be taxed as costs in compliance with the express terms of section 6135 of Crawford & Moses' Digest.

Appellant also contends for a reversal of the judgment on the ground that the undisputed testimony reflects that appellee was not totally and permanently disabled. This court has said that total disability as used in con-

tracts of this character exists when the injury of the insured prevents him from doing all the substantial and material acts necessary to be done in the prosecution of his business and that common care and prudence would require him, in his condition, not to do. *Industrial Mutual Insurance Co.* v. *Hawkins,* 94 Ark. 417, 127 S. W. 457; *Mutual Benefit Health & Accident Association* v. *Bird,* 185 Ark. 445. The testimony in the instant case tends to show that appellee should not have attempted to perform his accustomed duties in the due exercise of common care and prudence. The testimony warranted the submission of the issue of total and permanent disabilty of appellee to the jury.

Appellant also contends for a reversal of the judgment on the ground that appellee failed to notify appellant within a reasonable time of his total and permanent disability and loss of eye resulting from the automobile accident. It is true, as argued, that he did not notify appellant of the accident and consequent injuries for about nineteen months, but he testified that his failure was due to the fact that the major policy requiring that notice be given was not in his possession or subject to his inspection. The requirement for notice and proof of the injuries was not in the certificate delivered to him. When he obtained information that notice was required, he notified appellant. The question as to whether he gave the notice within a reasonable time was a question for the jury and not the court. The facts in this case bring it within the rule announced in the cases of *Concordia Fire Insurance Com-*

pany v. *Waterford,* 145 Ark. 420, 224 S. W. 953, and *Missouri State Life Insurance Company* v. *Barron,* ms. op.

Under our view of the case, the issue whether the injury received by appellee in the automobile accident resulted in permanent and total disability and the loss of his right eye, and whether he gave appellant timely notice were questions for determination by the jury under proper instructions. We have examined the instructions and find no conflict in them and that they correctly announced the law applicable to the facts in the case.

No error appearing, the judgment is affirmed.

IN THE SUPREME COURT OF ARKANSAS

Missouri State Life Insurance Company.....Appellant,

v.

Marion Johnson .....Appellee.

PETITION FOR REHEARING

The appellant, Missouri State Life Insurance Company, petitions this court for a rehearing upon the following grounds:

First: This court erred in holding that this case was not removable to the Federal court.

Second: The court erred in holding that the question as to whether the appellee had given notice of the loss of the sight of his eye within a reasonable time was for the jury.

Third: The court erred in holding that there was no error on the part of the lower court in giving appellee's instruction No. 5.

Attached hereto is brief in support of this petition for rehearing.

Allen May,

W. H. Glover,

Rose, Hemingway, Cantrell & Loughborough,

Attorneys for Appellant.

Filed Nov. 30, 1932.
W. P. Sadler, Clerk.

Proceedings December 12, 1932

REHEARING PETITIONS DENIED:

Being fully advised, the petitions for rehearing filed in the following causes are by the court severally overruled, viz:

2591. *Missouri State Life Insurance Company* v. *Marion Johnson*

* * *
* * *

IN THE SUPREME COURT OF ARKANSAS

Missouri State Life Insurance Company.....Appellant,

v.

Marion Johnson .....Appellee.

ORDER

Whereas, in the above entitled cause, the appellant contemplates an application to the Supreme Court of the United States for a writ of certiorari to review the judgment in this cause rendered by the Supreme Court of the State of Arkansas on the 14th day of November, 1932; and

Whereas said appellant has presented to me, a justice of said court, a bond conditioned according to law in such cases, which I do hereby approve;

Now, therefore, I grant a stay of execution upon the judgment rendered in this cause by the Supreme Court of Arkansas, as aforesaid, until the 14th day of February, 1933; and in case the appellant shall make application for such certiorari to the Supreme Court of the United States within that time, such execution shall be stayed until the Supreme Court of the United States has acted upon the appellant's application, and if such writ of certiorari is granted by the Supreme Court of the United States and the judgment herein is reversed, the bond aforesaid shall be void.

Frank G. Smith,
Justice, Supreme Court of Arkansas.

Filed Dec. 27, 1932.
W. P. Sadler, Clerk.

IN THE SUPREME COURT OF ARKANSAS

Missouri State Life Insurance Company.....Appellant,

v.

Marion Johnson .....Appellee.

STAY BOND

Whereas, on the 14th day of November, 1932, there was rendered in the Supreme Court of Arkansas, a final judgment in favor of Marion Johnson against the undersigned Missouri State Life Insurance Company for the sum of three thousand dollars ($3,000), with interest and costs, which costs includes an attorney's fee of five hundred and fifty dollars ($550); and

WHEREAS the said Missouri State Life Insurance Company desires to apply to the Supreme Court of the United States for a writ of certiorari to review the judgment aforesaid:

NOW, THEREFORE, the undersigned, Missouri State Life Insurance Company, as principal, and the undersigned, NATIONAL SURETY COMPANY as surety, hereby obligate themselves to the said Marion Johnson, his heirs and assigns, in the full sum of five thousand dollars ($5,000); YET, upon condition that if the said Missouri State Life Insurance Company shall fail to make application for said writ of certiorari within the period allowed therefor, or fails to obtain an order granting its application, or fails to make its plea good in the Supeme Court of the United States, it shall answer for all damages and costs which the said Marion Johnson may sustain by reason of the stay; but if application for certiorari is made in due time and granted, and the judgment aforesaid is reversed, then this bond shall be null and void.

IN WITNESS WHEREOF, the Missouri State Life Insurance Company has executed this instrument as prin-

cipal, by the hand of its attorneys and the undersigned NATIONAL SURETY COMPANY, as surety, has executed the same by the hand of its agent and under its corporate seal, this 23rd day of December, 1932.

MISSOURI STATE LIFE INSURANCE COMPANY,
By Rose, Hemingway, Cantrell & Loughborough,
Attorneys.
Principal.

NATIONAL SURETY COMPANY,
By Sid B. Redding, Agent and Resident Vice President,
(SEAL) Surety.

Filed Dec. 27, 1932.
W. P. Sadler, Clerk.

State of Arkansas—In the Supreme Court—

I, W. P. Sadler, clerk of said court, do hereby certify that the foregoing pages, numbered from 1 to ..... inclusive, are a true, full and complete transcript of the record called for by stipulation of counsel contained herein, in the case of *Missouri State Life Insurance Company, Appellant,* v. *Marion Johnson, Appellee,* together with the proceedings in and the opinion of the Supreme Court of Arkansas, and a copy of the bond filed by the appellant on his request for stay of judgment.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Little Rock, Arkansas, this 10th day of March, 1933.

W. P. Sadler,
Clerk, Supreme Court of Arkansas.
(SEAL) By C. R. Stevenson, D. C.

SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRIT OF CERTIORARI—Filed March 11, 1933

On consideration of the motion of counsel for petitioners in the above entitled cause, and good cause therefor having been shown,

It is now here ordered that the time within which petition for Writ of Certiorari may be filed herein be, and the same is hereby, extended for a period of 30 days from this date.

Pierce Butler, Associate Justice of the Supreme Court of the United States.

Dated this 10th day of March, 1933.

[File endorsement omitted.]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 8, 1933

The petition herein for a writ of certiorari to the Supreme Court of the State of Arkansas is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.